No. 14,750

IN THE

United States Court of Appeals

For the Ninth Circuit

PHYLLIS BAEKGAARD, formerly Phyllis Irene Carreiro,

Appellant,

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and WELLS FARGO BANK & UNION TRUST COMPANY,

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

Table of Authorities Cited

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BRIEF FOR APPELLEES.

I.

STATEMENT OF THE CASE.

Genee M. Carreiro, also known as Goldie Carreiro, and the decedent assured, Dr. George S. Carreiro, were married on January 18, 1927 (49). Genee Carreiro is the primary beneficiary of the life insurance policies described in the subject litigation (52). There was one child the issue of said marriage, namely, Phyllis Irene Carreiro, now known as Phyllis Irene

Baekgaard (50). The aforesaid child is designated as the secondary beneficiary in the aforesaid life insurance policies (53). Genee and Dr. Carreiro discovered that they could not effect a successful marriage and therefore on the 7th day of August, 1951 said parties entered into a property settlement agreement (50). The property settlement agreement which was introduced in evidence at the trial as an exhibit provided in part as follows (50):

> "Sixth. The husband shall receive and be entitled to the insurance policies hereinafter listed free and clear of any claims of the wife thereto.
>
> "Seventh. (In part.) The parties shall at any time or times hereafter make and execute and deliver any and all such further or other instruments, papers or things as the other of said parties shall require for the purpose of giving full effect to these presents and the covenants, provisions and agreements thereof."

The life insurance policies contemplated by the within action were specifically described in the aforesaid property settlement agreement.

Genee and Dr. Carreiro were divorced on August 22, 1951 and thereafter a final decree of divorce was duly made and entered on August 22, 1952 (50). Irene Carreiro, the second wife, and Dr. George Carreiro were married on the 20th day of December, 1952 (51) and Dr. George Carreiro died on the 2nd day of January, 1954 (51) without having effected a change of beneficiary under any of the aforesaid life insurance policies or in addition thereto without having

changed his Last Will and Testament to which reference will be hereinafter set forth (51). On September 6, 1951 the insurance company directed a letter to Dr. Carreiro which stated as follows:

> "We wish to thank you for forwarding to us a certified copy of the property settlement agreement between you and Mrs. Carreiro. The agreement has been attached to the permanent records of the home office and we can now consider that Mrs. Carreiro has no further community property interest in the policies.
>
> "If you wish to make any changes in the beneficiary arrangement please advise and forms will be prepared for your signature. We note that we are holding all of your policies with the exception of policy No. 842502 which is presently assigned to the bank." (54)

Thereafter and on November 26, 1951 the assured cashed a $15,000 policy and called at the office of the insurance company in order to effect this arrangement. Again on June 25, 1952 he cashed a $10,000 policy and again called at the insurance company to effect this arrangement. At no time did he comply with the request of the insurance company to sign a change of beneficiary form (70-1-2-3). Dr. George Carreiro duly executed a Last Will and Testament on January 3, 1951, which will had not been revoked at the date of his death on January 2, 1954 (51). The will, a copy of which is in evidence, was probated and therein the first wife, namely, Genee Carreiro, was named as executrix and also a residual legatee.

The insurance policies which are the subject of this action and which were introduced in evidence provide that if the first beneficiary is not living the second beneficiary will take and that if neither beneficiary is living the executor of the Last Will and Testament of the assured will receive the proceeds of the policies (52-3).

Said insurance policies were introduced in evidence, being defendant's Exhibits G-6, G-7 and G-8, and all of said policies provide on the first pages thereof as follows:

> "New England Mutual Life Insurance Company of Boston agrees to pay *at its home office in Boston, Massachusetts,* on receipt of due proof of the death of the insured, GEORGE S. CARREIRO, the face amount of $..... to the beneficiary * * *."

Upon certain occasions prior to the execution of the aforesaid property settlement agreement Dr. George Carreiro had signed change of beneficiary forms with the insurance company in question incident to borrowing certain sums of money (55).

The aforesaid Last Will and Testament of Dr. George Carreiro was kept with his life insurance policies in his office which was located in the City and County of San Francisco, State of California (55). In addition thereto the original Last Will and Testament of the father of Dr. George Carreiro was likewise kept with the the aforesaid insurance policies and Last Will and Testament (55). At a date subsequent to the execution of the aforesaid property settle-

ment agreement and after the divorce of George and Genee Carreiro and at a time subsequent to the execution of the aforesaid Last Will and Testament of Dr. George S. Carreiro, Dr. George Carreiro destroyed the original Last Will and Testament of his father but he did not destroy his own Last Will and Testament (56).

The first wife, the second wife, the daughter and the executor of the Last Will and Testament of the deceased assured all made claim to the complete proceeds of the insurance policies and by virtue of an inability to agree in regard thereto a trial was had. The Honorable Trial Court concluded that at the date of death of Dr. Carreiro said deceased assured had manifested by conduct or otherwise an affection and desire to benefit four persons, namely, his first wife, Genee Carreiro; his daughter, Phyllis Baekgaard; his second wife, Irene Carreiro, and his father, John J. Carreiro (57). The Court further concluded that the evidence placed before the Court was of such an inconclusive and contradictory nature that the invocation of principles of equity in requiring a compromise of the claims of all parties to the action was fit and proper in the premises (58). Therefore the Court concluded that equity and justice would best be served by rendering a judgment under the terms and provisions whereof all of the proceeds of the policies would be equally divided between the four persons, namely, the first and second wives, the daughter, and the father (58). The decision was acceptable to the first wife, the second wife and the

executor of the Last Will and Testament of the assured. The daughter has taken an appeal therefrom.

An additional policy issued by the Prudential Insurance Company of America provided for the payment of $5,000 to the beneficiary therein named upon the death of the aforesaid decedent, and it was conceded by all parties to the within litigation that the proceeds therefrom should be disposed of in the same manner as the proceeds from the aforesaid New England life insurance policies. The trial Court so held in that case, being civil number 34,472, and thereafter the appellant herein noticed an appeal therefrom, being civil number 14,878, before this Court of Appeals. The appellant moved this Honorable Court for an order staying further proceedings on appeal pending decision of this case and that judgment be entered in the *Prudential* case consistent with the final decision of the *New England* case. The appellees moved to dismiss the appeal by virtue of the aforesaid stipulation of the parties, but this Honorable Court granted a stay upon the condition that the *Prudential* case would be ultimately decided in like manner and upon the same terms as the aforesaid *New England Mutual Life Insurance Company* case.

II.

THE APPEAL IS FRIVOLOUS AND SHOULD BE DISMISSED.

All presumptions are in favor of the validity of the judgment from which the appeal was taken and a duty is cast upon the appellant to clearly show wherein the

trial Court has erred. This the appellant has failed to do. The only specification of error is set forth on page 7 of the appellant's brief and that specification is stated in general terms to be that under the applicable California law the proceeds of the policies are payable to appellant. Upon that statement alone respondents are entitled to a prompt dismissal of this appeal. The case of *Beck v. West Coast Life Insurance Co.,* 38 Cal. (2d) 643, cited by appellant on page 12 of her brief refers to the companion case decided by the United States Court of Appeals for the Ninth Circuit, *Beck v. Downey,* 191 Fed. (2d) 150, which case was ultimately decided on January 18, 1952 and thereafter cited in 198 Fed. (2d) 626. The latter case conclusively demonstrates that California law is not applicable to this particular case. The West Coast Life Insurance Company is a California corporation and the case merely held that by virtue thereof California law is applicable. The life insurance policies involved in this particular litigation, which policies were introduced in evidence, show that the companies were incorporated in Massachusetts and that performance of the contracts, to-wit, payment of any claims thereunder would be made at the home office, namely, Boston, Massachusetts. Therefore, applying the very principles laid down in the *Beck v. Downey* case California law is clearly inapplicable. The *Beck v. Downey* case is clearly against appellant and would result in all the proceeds of the insurance policies being paid to the executor of the Last Will and Testament of the deceased assured. Further comment in regard thereto will be made hereinafter.

The *Thorpe* case cited by appellant is distinguishable upon its facts and in no manner is authority for the proposition that the secondary beneficiary takes. Additional comment concerning this case will be made herein. The major dereliction of duty by the appellant in this case lies in her complete failure to comply with rules of procedure relative to an appeal from a judgment. The sole issue before the trial Court was the intention of the deceased assured in regard to the disposition of the proceeds of policies of life insurance. All the cases upon this subject reiterate the point that each case must be decided upon its own facts. After considerable testimony was adduced at the trial the honorable trial Court concluded that by virtue of many inconsistent statements and actions it was impossible to ascertain and determine the true and correct intention of the deceased assured, but one point had been established, namely, that at the time of his death he had in mind four persons who had been or were at that time close to him, namely, his first wife, his second wife, his daughter, and his father. This was an equitable proceeding and therefore the Court invoked its prerogative in effecting equity and justice by making an equal division of the proceeds between four persons. The appellant's brief is strangely silent about this procedure notwithstanding the fact that it does have precedent. It is respectfully submitted that the appellant has a duty to indicate to the appellate tribunal why the trial Court erred in invoking this equitable principle, wherein the error lay and the citation of authorities substantiating

the aforesaid assertion of error. In the absence thereof it should be conclusively presumed that the appellant acquiesces in this procedure followed by the trial court.

III.

THE CASES CITED BY APPELLANT ARE INAPPLICABLE.

The case of *Beck v. West Coast Life Insurance Co.*, 38 Cal. (2d) 643, is cited by appellant for the proposition that the purported disqualification of the primary beneficiary to take the proceeds of the insurance policies is equivalent to death and therefore the secondary beneficiary automatically takes. The aforesaid case of *Beck v. West Coast Life Insurance Co.*, related to a situation wherein the primary beneficiary murdered the assured and therefore in expressing the public policy of the State of California, the California Supreme Court stated that it would be improper for a person to benefit by his own wrong and that inasmuch as the murderer was convicted of the crime and given life imprisonment this under California law was civil death which in effect was the same as actual death. The strong dissenting opinion, however, pointed out very clearly that the terms and provisions of the policy used the word "death" in the sense of being dead and buried under the ground, that if the insurance company writing the policies intended anything else it certainly would be clearly stated that the primary beneficiary would not take if dead or legally disqualified or incompetent. The *Beck v. West Coast Life In-*

surance Co. is a California case involving a California insurance company wherein performance of the contract would be made in California. The *Beck v. Downey* case decided by this honorable Court and cited at 191 Fed. (2d) 150 and 198 Fed. (2d) 626, arose out of the same factual situation but related to a policy not payable in California. This honorable Court specifically disapproved of the aforesaid theory advocated by the California Supreme Court and refused to follow that case and provided that the proceeds of the policies of life insurance would be payable to the representative of the estate of the deceased assured. This honorable Court said in the case of *Beck v. Downey,* cited at 191 Fed. (2d) 150, at page 152 as follows:

> "The words 'if living' must be interpreted in their ordinary common sense meaning, namely, that the insured intended the proceeds to go to her mother-in-law if the beneficiary were not alive but was dead and buried. Had there been an intent to have the proceeds go to the contingent beneficiary in the event of the incapacity of the beneficiary while alive to take the proceeds, plain language to that effect could and certainly would have been used. We think the language of the policies was clear and unequivocal. Any disability of the beneficiary such as civil death, assuming it to be applicable to this case, constituted a sanction or penalty imposed upon the beneficiary David A. Downey and affected only his rights and privileges."

In the case of *Beck v. West Coast Life Insurance Co.* there was excellent reasoning in the dissent of

Justice Edmond M. Spence which stated in part on page 648, et seq., as follows:

> "The parties agree that there is no ambiguity in the beneficiary clause of the policy which would justify the admission of extrinsic evidence to explain the meaning of the words used in it. The decisive question therefore is a very narrow one of textual interpretation. In the opinion of Justice Edmonds only by ignoring the clear and unequivocal language of the policy of insurance may the conclusion be reached that the alternative beneficiary is entitled to the proceeds despite the fact that the contingency conditioning her right has never occurred. The decision is placed upon the ground that the policy names the one the insured wished to take if the husband could not. In effect the clause, if living, is enlarged but the provisions of the policy do not express any intention to mean if living and not otherwise disqualified to take. The contract specifically states as the only contingency upon which the beneficiary could not be entitled to its proceeds would be that he would be dead. In the construction of an instrument the office of the judge is simply to ascertain and to declare what is in terms or in substance contained therein, not to insert what has been omitted. (CCP §1858)"

It is therefore clear that upon the authority of the case of *Beck v. Downey,* supra, the entire proceeds of all the insurance policies encompassed herein should be payable to the Wells Fargo Bank as executor of the Last Will and Testament of the deceased assured.

The case of *Thorpe v. Randazzo,* 41 C. (2d) 770 cited by appellant is certainly distinguish-

able factually. The case is cited by appellant for the authority that the primary beneficiary is not entitled to the proceeds of the policies. It is not authority for the proposition that if she is not entitled to the proceeds of the policies the secondary beneficiary is so entitled. As a matter of fact, it is merely authority for the proposition that *if* the primary beneficiary is not entitled to the proceeds of the insurance policies, the personal representative of the estate of the deceased assured is entitled thereto. Consequently, the aforesaid *Thorpe v. Randazzo* case cited by appellant in no way assists her position, but on the contrary is excellent authority for the proposition that the entire proceeds of the policies are payable to the Wells Fargo Bank, as executor of the last will and testament of the deceased assured. However, it is herein asserted that the *Thorpe* case is not applicable to this particular case. In the *Thorpe* case the wife signed both forms of change of beneficiary and the husband actually had one policy changed. He neglected to change the other and there was evidence that the insured thought that the other policy had lapsed. A premium had been tendered and refused by the insurance company. The Court said at page 774:

> "The failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change *but each case must be decided on its own facts.*"

The Court commented at page 776 on the lapsed policy and the deceased having thought that it was lapsed and assuming that it had been waived and stated:

> "It might be reasonably concluded that the deceased decided to proceed no further with the matter (the wife had signed change of beneficiary forms) and that when he was notified by the insurance company that his tendered premium payment would not be accepted in reinstatement of the policy he assumed that the policy was terminated and that it would be an idle act to request the company to make a change of beneficiary."

The *Thorpe* case can be clearly distinguished upon its facts from the Carreiro case. Primarily it cannot be denied that irrespective of the fact that the wife intended to relinquish any interest in and to the insurance policies at any time thereafter the husband had the right to effect a gift of the proceeds back to his wife. Furthermore, it is believed fundamental that in probing for the solution of this particular problem the intent of the deceased assured is of prime importance.

The property settlement agreement contained phraseology indicating acts to be done in the future and privileges accorded which might of necessity require further acts upon the part of the wife. Article VI, provision 7th thereof, of the aforesaid property settlement agreement provides in part as follows:

> "The husband *shall receive* and *be entitled to* the insurance policies hereinafter listed free and clear of any claims of the wife thereto."

Again, Article VII provides as follows:

> "The parties shall at any time or times hereafter make and execute and deliver any and all

> such further or other instruments, papers or things as the other of said parties shall require for the purpose of giving full effect to these presents under the covenants, provisions and agreements hereof."

Again it is clear that both parties contemplated the possibility of future acts or statement required of the wife. On September 6, 1951, more than eleven months prior to the rendition of the final decree of divorce but at a time after the interlocutory decree of divorce the insurance company directed a letter to the deceased assured which stated in part as follows (54):

> "If you wish to make any changes in the beneficiary arrangement please advise and forms will be prepared for your signature."

Shortly thereafter and on November 26, 1951 the deceased assured cashed a $15,000 policy and called at the office of the insurance company in order to effect this arrangement. Again and on June 25, 1952 he called at the office in person and cashed a $10,000 policy. At no time while at the insurance company office or otherwise did he comply with the request of the insurance company relative to signing change of beneficiary forms.

The decedent drew a last will and testament on January 3, 1951 which will had not been revoked at the date of his death. In this will the first wife was named as executrix and also a residual legatee and devisee. Notwithstanding the fact that the parties were divorced on August 22, 1952 no change was made in the will. However, the Court specifically found

(55) that this last will and testament of Dr. Carreiro was kept by him together with the life insurance policies in question and the original will of the father of Dr. Carreiro in his office in San Francisco. The Court further found that at a date subsequent to the execution of the aforesaid property settlement agreement and after Dr. Carreiro had divorced Genee Carreiro and after the execution of the last will and testament of Dr. Carreiro, Dr. Carreiro destroyed the original last will and testament of his father but that he did not destroy his own last will and testament.

Dr. Carreiro remarried on December 20, 1952 and the name of his second wife was Irene Carreiro. The doctor died thereafter on January 2, 1954, but despite this second marriage Dr. Carreiro did not effect a revocation of his last will and testament nor make any effort to change the beneficiary forms of his life insurance policies. It is clear therefore that the *Thorpe* case is inapplicable and that the intention of Dr. Carreiro as evidenced by his acts was clearly to effect a gift to his first wife.

The cases of *Jenkins v. Jenkins,* 112 C.A. 403; *Grimm v. Grimm,* 26 Cal. (2d) 173; *Miller v. Miller,* 94 C.A. (2d) 785, and *Shaw v. Board of Administration,* 109 C.A. (2d) 770, support the position of the first wife that notwithstanding a release in a property settlement agreement the proceeds of the policies are payable to her upon the death of the assured if a beneficiary change has not been executed. The strongest support of the first wife's case, however, is probably in the aforesaid *Thorpt v. Randazzo* case which states in part as follows at page 774 thereof:

"The failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he has not wished to effect such a change, but each case must be decided on its own facts."

IV.

CONCLUSION.

Inasmuch as the appellant has failed to comply with her duty of clearly demonstrating to the appellate tribunal wherein the trial Court erred and in addition thereto has predicated her legal reasoning upon a California case which is clearly inapplicable, it is the position of the appellees that the aforesaid appeal should be summarily dismissed by the appellate tribunal without the necessity of an affirmance of the judgment. The appellees respectfully assert that the decision from which the appeal is taken is equitably sound and has great merit and by virtue of their refusal to take an appeal therefrom and also the stipulation in the record, they and each of them, consent to an affirmance of the aforesaid judgment. However, if this Honorable Court believes that the equitable powers of the trial Court would not permit an equal division of the proceeds of the aforesaid policies and that therefore there must be a determination in regard to one of the four claimants, it is clear that by virtue of the cases cited by appellant and the cases cited herein that the entire proceeds of the policies must be paid either to the first wife, Genee

Carreiro, or to the Wells Fargo Bank as executor of the last will and testament of the deceased assured.

Dated, San Francisco, California,
February 24, 1956.

Respectfully submitted,

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